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No. . . .

IN THE

# Supreme Court of the United States

October Term, 1980

HELEN SMITH,

*Petitioner,*

*vs.*

FEDERAL DEPOSIT INSURANCE CORPORATION, As Receiver of UNITED STATES NATIONAL BANK,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit.**

## Petition for a Writ of Certiorari.

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## Petition for a Writ of Certiorari.

### The Questions Presented for Review.

1. Where Petitioner has been restrained by court orders and contempt proceedings from prosecuting essential defendants in mechanic's lien foreclosure suits, should a District Court's *sua sponte* dismissal of the entire action for failure to prosecute other defendants be permitted to stand?

2. Where Petitioner disobeyed no order, did not fail to appear at any hearing, had no prior warning to proceed, and no alternatives were explored by the District Court, should a District Court's *sua sponte* dismissal for failure to prosecute be permitted to stand?

3. Where counsel explained to the District Court many interrelated pending actions and settlement efforts, and expressed the view that judicial economy was best achieved by staying some actions until a Chapter X Reorganization Court was ready to hear all matters at one time, should the District Court's refusal to grant Rule 60(b) relief from its *sua sponte* dismissal be permitted to stand?

4. Do the District Court's *sua sponte* dismissal under the above circumstances and the Court of Appeals' affirmance constitute such a departure "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision"?[1]

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[1]Rules of the Supreme Court of the United States 17.1(a).

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## OPINIONS BELOW.

The opinion of the Court of Appeals affirming the District Court (App. G, *infra*, A20-A21) is not reported. The order of dismissal by the District Court (App. A, *infra*, A1) and its opinion denying reconsideration (App. B, *infra*, A2-A4) were not reported.

## BASIS OF JURISDICTION.

The Judgment of the Court of Appeals was entered on July 23, 1980; rehearing and suggestion for rehearing en banc were denied by Order filed September 15, 1980. The Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

## STATEMENT OF THE CASE.

### A. THE FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED.

At a noticed hearing on January 3, 1977,[2] the District Court for the Southern District of California *sua sponte*, without benefit of briefs, affidavits, or testimony and without any warning or tentative ruling, dismissed three related mechanic's lien lawsuits. Counsel for Petitioner objected and stated a desire to prosecute the actions at the "pleasure" of the court. The dismissals were ordered despite former counsel having been restrained by two separate court orders from prosecuting, having been the target of a sealed order

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[2]Pursuant to Local Rule 10, which provided:

> DISMISSAL FOR WANT OF PROSECUTION
>
> Actions or proceedings, other than in bankruptcy, which have been pending in this court for more than six months without any proceeding having been taken therein during such period, may, after notice, be dismissed by the court for want of prosecution, at the calling of a calendar prepared for that purpose by the clerk. Such a dismissal shall be without prejudice.

re contempt for trying to prosecute, and having been denied permission to proceed against the principle defendant.

The three related mechanic's lien lawsuits had been filed in the state court by Petitioner, Helen Smith (sometimes hereafter "Mrs. Smith"), in April and September, 1974.[3] The principal defendant was the Westgate-California Corporation ("WCC"). There has never been a hearing on the merits.

The contract on which the lawsuits are based, dated April 17, 1967, was between Mrs. Smith (then Mrs. Helen Hill) and WCC. CT 8. It called for her to perform interior decorating services and supply furniture and materials for two hotels and a club[4] to be constructed in downtown San Diego. The three lawsuits allege WCC failed to pay $908,902.03 still due under the contract (CT 267-22; CT 506-11; CT 507-09) and that Mrs. Smith had taken the necessary steps to perfect mechanic's lien rights under California law. Actions 74-267 and 74-507 sought to enforce liens on the Westgage Executive Hotel and Cuyamaca Club property. Action No. 74-506 sought to enforce a lien on the Westgate Plaza Hotel property.

In the beginning, Petitioner was represented by Joseph J. Fisch, and present counsel were substituted on May 24, 1976. Thus, two time frames are used to explain the course of the proceedings and the conduct of counsel below.

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[3]After removal, the April action had District Court No. 74-267-E and the September actions were Nos. 74-506-E and 74-507-E. They are very similar, and the Clerk's Transcripts in all three are similar. Accordingly, references to the Clerk's Transcript ("CT") will be to the Clerk's Transcript in No. 74-267 unless otherwise indicated.

[4]The hotels were the Westgate Plaza Hotel and the Westgate Executive Hotel; the club was the Cuyamaca Club.

**1. June 1974 - May 1976.**

WCC had filed for protection under Chapter X of the Bankruptcy Act, and blanket restraining orders were issued on February 26, 1974. CT 236, 241-42. Subsequently, four subsidiaries of WCC were joined in the Chapter X reorganization of the parent. CT 232. One of those, Westgate California Realty Co., was also a defendant in action No. 74-506. CT 506-7.

On July 9, 1974, pursuant to a joint application by the Trustees of WCC and by the receiver of three other defendants in one of the three actions (South Plaza, Inc., Westgate Executive House, and Cuyamaca Management Corporation), the District Court ordered that, "Helen Smith [is] enjoined and restrained from taking any further action of any nature whatsoever against [said entities in action No. 74-267-E] . . . until further order of this Court." CT 75-76.

In December 1974, attorneys for the Federal Deposit Insurance Corporation ("FDIC"),[5] lienholders of the property liened by Petitioner, filed notices for the deposition of Mrs. Smith (CT 29, 32, 35) and on January 27, 1975 filed a "First Set of Interrogatories." In response, Mr. Fisch, stating he was prevented "from taking part in proceeding further in any way with the prosecuting of the action" (CT 77), requested the FDIC to secure an order allowing both Petitioner and the FDIC to proceed with discovery. CT 77. Such an order was issued on March 3, 1975. CT 86-87. Mr. Fisch, in response to a motion by the FDIC to compel responses to the interrogatories and to a document request (CT 88-93), sought a continuance of discovery deadlines. CT 94-97. The District Court granted additional time

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[5]The FDIC had been appointed Receiver of the United States National Bank of San Diego on October 18, 1973.

(CT 98), and the FDIC's discovery was timely responded to on June 17, 1975 (CT 100-101) and June 30, 1975 (CT 102-126) without further delay, objections, or motions.

In the meantime, contempt proceedings were brought against Petitioner and Mr. Fisch for having sued WCC in the three lawsuits after the bankruptcy stays. A District Court Memorandum re contempt was sealed on May 22, 1975 (CT 243). Petitioner and Mr. Fisch then filed a dismissal as to WCC on May 27, 1975. CT 99.

On June 16, 1975, Mr. Fisch, on behalf of Mrs. Smith, filed a motion in the WCC Chapter X reorganization to be permitted to prosecute one of the three lawsuits (action No. 74-267). In opposition, attorneys for the trustees of WCC contended the issues in this lawsuit were basically the same as claims which had been filed by Petitioner in the Chapter X proceedings and judicial economy as well as reorganization law dictated that the issues should be litigated in the Chapter X proceedings and not in this separate action. CT 244-49. On August 21, 1975, the bankruptcy court denied Mrs. Smith's motion, stating:

> There is no showing upon the record made to date that there would be any judicial economy obtained by permitting the moving party to pursue her cause of action in a separate suit before Judge Enright [and outside the Westgate reorganization].[6]

CT 254.

Thus, as of August 1975, Mrs. Smith was restrained by court order from prosecuting these three actions against WCC, the principal defendant, and the other defendants.

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[6]An additional factor raised by the WCC trustees and accepted by the Reorganization Court in refusing to permit action No. 74-267 to proceed was the trustees' attempt to subordinate the claims of Mrs. Smith.

She and her counsel had had contempt proceedings brought for attempting prosecution and had unsuccessfully sought permission to reopen one of the cases.

During this period before May of 1976 and the ensuing months after present counsel was substituted for Mr. Fisch, there were in place three other related litigation matters against Mrs. Smith in which the FDIC and/or WCC were also parties. The first of these, commenced in April 1974, stemmed from the same 1967 contract as the mechanic's lien lawsuits. It was brought by WCC trustees and the FDIC to determine title to antique furniture located in the hotel complex and to determine rights under a lease.[7] The next related lawsuit was filed April 21, 1975 by the WCC trustees claiming over $1.5 billion against multiple defendants including Mrs. Smith.[8] Yet a third matter relating to the 1967 design services contract was a motion by the WCC trustees

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[7]Present counsel for Petitioner were engaged to assist in that litigation which was heard before a Magistrate in August, 1975 and February, 1976. It resulted in an adverse "Recommendation" which was approved by the District Court (Honorable William B. Enright), who entered judgment on May 7, 1976 (action No. 74-50). The Ninth Circuit affirmed on February 9, 1979. This Court denied certiorari on October 1, 1979 (No. 78-1730).

[8]*Trone v. Smith*, U.S. Dist.Ct. (So. Cal.), No. 75-213. Against her it was claimed that she overcharged for materials furnished WCC and was not entitled to any more payments for merchandise or services. Mrs. Smith was given an open extension of time to respond (none has yet been requested or filed). It was presumed by present counsel that the trustees too desired to have just one more litigation experience to resolve the disputes between Petitioner and WCC arising from the 1967 contract. CT 211-217. An issue was raised as to whether there was a conflict by counsel for the trustees. On June 23, 1980, the Ninth Circuit reversed Judge Enright's refusal to remove (Ninth Circuit No. 77-1832). No counsel have yet been substituted in that case and it is still dormant.

on November 5, 1976 to summarily subordinate all of Mrs. Smith's claims in the WCC reorganization.[9]

### 2. May 24, 1976 - March 17, 1977.

Thus, on May 24, 1976, when present counsel were substituted as counsel for Petitioner in the mechanic's lien cases (CT 128), counsel was in the process of appealing from the adverse antique furniture judgment[10] and shortly thereafter resisting the trustees' November 5, 1976 summary motion to subordinate all of Petitioner's claims in the Chapter X proceedings. New counsel were aware of the actions by and against former counsel and had concluded that the essential issues of these cases would best be litigated only once and in the Chapter X proceedings. Consequently, no action was taken by counsel to set these foreclosure cases for trial. CT 211-217.

Next, on December 13, 1976, the District Court *sua sponte* noticed a January 3, 1977 hearing as to why Petitioner's three mechanic's lien foreclosure cases should not be dismissed for want of prosecution under local Rule 10.[11] CT 129. At the hearing only counsel for Mrs. Smith and the FDIC appeared. Counsel for Mrs. Smith summarized the prior restraints and contempt against Mr. Fisch, and then said, "[O]ur offices would request a reasonable period of

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[9]Although the Bankruptcy Court refused subordination of most of these claims on the motion for summary judgment, on appeal by the WCC trustees the same District Court here involved (the Honorable William B. Enright) reversed and granted a summary judgment of subordination on May 15, 1978. The ensuing appeal is civil action 78-2603 in the Ninth Circuit. The matter has been briefed, oral argument occurred on October 21, 1980, and Petitioner is awaiting the Ninth Circuit's decision.

[10]Notice of Appeal filed July 12, 1976 (App. D, *infra*, A10, Item 32).

[11]The notice was sent to Mr. Fisch instead of substituted counsel in error, but present counsel were given telephonic notice by the attorneys for the WCC trustees on or about December 21, 1976.

time, *whatever is your Honor's pleasure . . .*" to investigate if it were feasible to prosecute the actions in light of the restraints, and indicated "no [other] impediment to . . . proceeding in these three foreclosure actions." TR January 3, 1977, at 2-6. However, the District Court, without any briefing, affidavits, or live testimony, and without any prior warnings or tentative ruling, dismissed all three actions.[12]

In a subsequent motion under Fed. R. Civ. P. 60(b) for reconsideration, the array of related litigation, settlement discussions, and counsel's reasons for not actively seeking to go to trial were more fully developed. CT 135-154, 210-225.[13] The motion was denied.

After briefing and oral argument, the Ninth Circuit first requested an Agreed Statement of significant dates (App. C and D, *infra*, A5-A12), and then remanded the case to the District Court under an order filed August 20, 1979 (App. E, *infra*, A13-A14) with instructions to make findings of fact and conclusions of law "setting forth the particulars wherein appellant was at fault for failure to prosecute." Both the FDIC and Mrs. Smith submitted proposed findings and conclusions to the District Court. The FDIC's were

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[12]Although the three actions were dismissed "without prejudice" under Local Rule 10, the effect is the same as a dismissal with prejudice, because a dismissal without prejudice operates as though no action had been filed at all, and any statute of limitation is not tolled. *Moore v. St. Louis Music Supply Company*, 539 F.2d 1191, 1194 (8th Cir. 1976). Accordingly, the 90-day bar date under Cal.Civ. Code §1190 for filing a foreclosure action after recording of a mechanic's lien has long passed.

[13]An order dismissing the actions was filed March 17, 1977 (App. A, *infra*), and judgment of dismissal was entered the same date (CT 132) in all three actions. Mrs. Smith both appealed and filed the Motion for Reconsideration on April 15, 1977. CT 133, 135. The motion for reconsideration was denied on May 25, 1977 (App. B, *infra*, A2-A4), and Mrs. Smith appealed from that denial. CT 296. Pursuant to order of the Ninth Circuit dated April 7, 1978, the six appeals (three from the original dismissal and three from the District Court's denial of the motion to reconsider) were consolidated.

adopted and signed by the District Court without change (App. F, *infra*, A15-A19), even keeping the title thus showing FDIC as the author! App. F., *infra*, A15.

On July 23, 1980, the Court of Appeals, without giving Mrs. Smith any opportunity to comment upon the FDIC's, findings and conclusions, affirmed the dismissals in a two-page Memorandum. App. G, *infra*, A20-A21.[14]

**B. BASIS OF FEDERAL JURISDICTION IN THE FIRST INSTANCE.**

The basis of federal jurisdiction in the first instance is 12 U.S.C. §1819, providing in part that "the United States district courts shall have original jurisdiction" over all suits of a civil nature to which the FDIC is a party.

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[14]Judge Pierson M. Hall, an active member of the panel at oral argument on April 14, 1979, died, and the panel was reconstituted by the addition of Judge Farris in May, 1980. No further oral argument or briefing occurred.

## ARGUMENT.

Every failure to prosecute case necessarily turns on its own facts, but no reported case in the federal courts upholds a dismissal without some showing that counsel ignored a warning, failed to comply with a court order, or by some overt act exhibited a lack of interest in the case or a lack of respect for the court's directives. Nothing in the record of the case at bar even comes close to deliberately dilatory or contumacious conduct. No court order was flaunted, no hearing was ignored, no trial or pre-trial date was continued. Moreover, at the housekeeping hearing counsel opposed dismissal, indicated a willingness to proceed—"whatever is your Honor's pleasure"—and was given no alternative of any kind except total dismissal of the entire actions.

### A. This Case Represents an Egregious Departure From the Accepted and Usual Course of Judicial Proceedings in the Ninth Circuit Court of Appeals.

The most recent reported Ninth Circuit case is *Tolbert v. Leighton*, 623 F.2d 585 (9th Cir. May 29, 1980), which reversed a *sua sponte* dismissal. The case had been pending for seven months, and plaintiff's attorney's failure to attend a status conference was the only evidence of dilatoriness.[15]

Although the factual analogy of *Tolbert* to the instant case is not exact, the *Tolbert* court explained a critical and unwavering aspect of appellate review of district court *sua sponte* dismissals that is squarely applicable here. It said, "Especially where *one* or more of these factors is present, before dismissing a case a district court *must* consider some

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[15]In the case at bar, present counsel had been in the case for a little over seven months; WCC had on July 13, 1976 transferred its interest in the properties liened by actions 74-507-E and 74-267-E, just five months before the Rule 10 dismissal notice. App. D, *infra*, A10, item 33.

of the less drastic alternative sanctions at its disposal." *Id.* at 587 (emphasis added unless otherwise noted). The factors noted by the court were, "(1) the *only* evidence of dilatoriness is . . . failure to attend a pretrial conference; (2) the court has not warned that failure to attend will create a risk of dismissal; and (3) the case is still 'young.' " *Id.* at 587 (emphasis by court). Analogizing, it is believed that because of the surrounding circumstances the case at bar should be considered "young" (factor 3) and the actions by counsel not sufficiently dilatory to warrant dismissal (factor 1). Regardless how one may evaluate the facts here relevant to factors (1) and (3), it is inescapable that factor (2) (*no* warning of risk of dismissal) is present in the case at bar. Thus, according to the Ninth Circuit, to avoid an abuse of discretion, and "before dismissing . . . a district court *must* consider some of the less drastic alternative sanctions. . . . " *Id.* at 587. The only usual and accepted course of action by the Ninth Circuit was to reverse. It erred.

In an earlier case, *Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1339 (9th Cir. 1970), the Ninth Circuit stated the unwavering standard for review of dismissal orders: "In reviewing the propriety of dismissal under Rule 41(b) we should, we think, look to see whether the court might have first adopted other, less drastic alternatives."

Another recent case, *Schmidt v. Herrmann*, 6 F.2d 1221 (9th Cir. 1980), although affirming a dismissal, was careful to point out, "courts have been reluctant to impose the ultimate sanction of dismissal with prejudice" (*Id.* at 1223); "aggravating circumstances may make a dismissal with prejudice appropriate" (*Id.* at 1224); and, in that case, "the [district] court warned appellants that the claims would be

dismissed if there was a failure to comply with the court's orders." *Id.* at 1224.[16]

Finally, another reversal case, *Pearson v. Dennison*, 353 F.2d 24 (9th Cir. 1965), noted that prejudice may be presumed where dilatoriness is aggravated and other factors militate for dismissal (such as adequate warning). Nevertheless, in balancing the two countervailing policies—"prompt disposition of litigation" and "deciding cases on their merits"—it said: "In considering whether that policy [the latter] should prevail, the trial court, *and this court*, can consider the actual prejudice shown, as compared to the presumed prejudice to which we referred in *Hicks, supra*." *Id.* at 29. No affidavits of any kind were filed in our matter by defendant/appellee (FDIC) claiming actual prejudice because, in fact, no actual prejudice existed.

**B. This Case Represents an Egregious Departure From the Accepted and Usual Course of Judicial Proceedings in Other Circuits.**

The Second Circuit reversed a failure-to-prosecute dismissal in *Schenck v. Bear, Stearns & Co., Inc.*, 583 F.2d 58 (2nd Cir. 1978). In that case, as in the case at bar, no party had indicated any desire to move the case. The Circuit Court stated: "Defendants' counsel made no request for dismissal. There had been no pre-trial or scheduling conference, nor was there any judicial participation indicating that a dismissal might be in the offing." *Id.* at 59. But the

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[16]Additional Ninth Circuit cases emphasizing the point are *Huey v. Teledyne, Inc.*, 608 F.2d 1234, 1238 (9th Cir. 1979), and *Von Poppenheim v. Portland Boxing & Wrestling Comm'n*, 442 F.2d 1047, 1054 (9th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972).

Consistent with this Ninth Circuit policy, it was noted in *Kung v. FOM Ind. Corp.*, 563 F.2d 1316 (9th Cir. 1977), that before ordering a dismissal the District Court had granted a continuance "with the understanding that the actions would be dismissed if Kung was not ready for a pre-trial conference within sixty days." *Id.* at 1318.

court noted plaintiff "had been anything but diligent in prosecuting the action. Furthermore, counsel's excuses . . . do not justify the delay here. Nevertheless . . . we conclude . . . it was an abuse of discretion for the court on its own motion to dismiss the cross-complaint for failure to prosecute." *Id.* at 60.

Other circuits which require a showing of deliberately dilatory or contumacious conduct by plaintiff's counsel before dismissing *sua sponte* discuss their views in *Pond v. Braniff Airways, Inc.*, 453 F.2d 347, 349 (5th Cir. 1972) (dismissal reversed because "the conduct of counsel was no more than inadvertence"); *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974) ("The facts do not depict 'a drawn out history' of 'deliberately proceeding in a dilatory fashion,' as in Link. . . ."); *Raab v. Taber Instrument Corp.*, 546 F.2d 522, 524 (2nd Cir. 1976) (Trial court dismissal reversed because both court and counsel "had breathed new life" into the case after a seven-year period of inactivity); *Wrenn v. American Cast Iron Pipe Co.*, 575 F.2d 544, 546 (5th Cir. 1978) ("The record does not reflect contumacious conduct by Wrenn." *Id.* at 546); *Jackson v. Washington Monthly Co.*, 569 F.2d 119, 123-124 (D.C. Cir. 1978) (Dismissal was "predicated . . . upon . . . a single violation by counsel of a pretrial directive." *Id.* at 121. Court of Appeal vacated stating, "But *Link* and the cases interpreting it have thus far generally approved dismissal . . . *only* where the attorney has taken a *course of protracted neglect.*" *Id.*); *Holt v. Pitts*, 619 F.2d 558, 562 (6th Cir. 1980) (Court noted the "Catch-22" situation confronting a plaintiff who is, through no fault of his own, prevented from participating or prosecuting only to have the case dismissed for failure to prosecute. *Id.* at 562); *Matter of Dolleslager*, 618 F.2d 322, 324-25 (5th Cir. 1980) (Failure to "file a pretrial statement as directed by the third

pretrial order . . . was counsel's error, but the error does not justify the sanction of dismissal. . . ." *Id.* at 326). *Heidelberg v. Hammer*, 577 F.2d 429 (7th Cir. 1978) (dismissal for failure to prosecute reversed because plaintiff's failure to request relief "was based on a justifiable belief that [available procedure] would have been futile." *Id.* at 431.) *M. S. v. Wermers*, 557 F.2d 170, 175 (8th Cir. 1977) (The permissible range of discretion requires trial court to find " 'a clear record of delay or contumacious conduct by the plaintiff.' ").

Even dilatory or contumacious conduct does not *ipso facto* result in a dismissal for failure to prosecute. Courts, including the Ninth Circuit as noted above, require an exploration of alternatives to outright dismissals. Yet, in the case at bar no consideration was given to lesser sanctions. In addition to the *Schenck* case, *supra*, other Courts of Appeals have insisted on an exploration of less severe sanctions before ordering outright dismissal. In *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 247 (5th Cir. 1980), the Court of Appeals reversing a dismissal with prejudice said, "we have consistently held that dismissal with prejudice is warranted only where 'a clear record of delay or contumacious conduct by the plaintiff' exists . . . and 'a lesser sanction would not better serve the interests of justice' [citing six cases]." In *Alamance Industries, Inc. v. Filene's*, 291 F.2d 142, 146 (1st Cir. 1961), it was held that the primary intent of dismissal rules was to prevent dismissals "which unfairly affect the other side, and permit the imposition of curative sanctions." In *Reizakis v. Loy*, 490 F.2d 1132 (4th Cir. 1974), the Court of Appeals reversing a failure-to-prosecute dismissal said, "In selecting an appropriate sanction for this dereliction, the district court did not consider measures less drastic than dismissal, such as, imposing a fine or costs against Reizakis' attorneys." *Id.*

at 1135-36. *See also, Heidelberg v. Hammer*, 577 F.2d 429, 431 (7th Cir. 1978) ("Other possible means of disposing of the case on the merits [should have] been explored and found not to be feasible 'before dismissal.' "

Thus, in all circuits counsel can expect that conduct must be aggravated and some warning or lesser sanction given before the client will be *sua sponte* deprived of a trial on the merits.[17]

### C. This Case Represents an Egregious Departure From the Accepted and Usual Course of Judicial Proceedings in the Southern District of California.

In order to illustrate the accepted and usual course of proceedings in the Southern District of California a search was made of all Local Rule 10 dismissals for the five-year period—July 1, 1972-June 30, 1977.

There were 116 cases dismissed under Local Rule 10 for failure to prosecute.[18] (Three of these are the cases in this consolidated appeal.) In 99 of the cases the plaintiff made no appearance at the hearing. In the remaining 14 where there was an appearance by plaintiff, twelve contain no indication that any objection was made. Thus there were only five cases in the five years dismissed under Local Rule 10 where plaintiff appeared and made objection. As noted, three are involved in this appeal.

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[17]*See, Jackson v. Washington Monthly Co.*, 569 F.2d 119, 123-124 (D.C. Cir. 1978). "Trial-court dismissal of a lawsuit never heard on its merits as a drastic step, normally to be taken only after unfruitful resort to lesser sanctions."; *Holt v. Pitts*, 619 F.2d 558, 562 (6th Cir. 1980), "[S]uch dismissal should be used only in extreme situations. . . ."

[18]Pursuant to Federal Rules of Evidence 201, this Court is requested to take judicial notice of the disposition of these dismissal cases.

In one of two remaining case, "plaintiff failed to appear at the initial Rule 10 hearing and two continuances were granted to insure plaintiff an opportunity to respond." Also, "plaintiff even failed to serve the Complaint on the defendants." In the other case, nothing happened in the eleven months after filing; again, no defendants were even served. In both of these cases the plaintiffs appeared in propria persona.

Thus, it can be said that no case in the five years preceding the instant dismissals was weighed on the scales of justice and reason by any Southern California District Court quite like these three.[19] No case was dismissed where plaintiff's attorney stated a desire to proceed.

**D. The Reasons Articulated by the Court of Appeals for Affirming Are Not Supportable From the Record or by Inference.**

The Court of Appeals failed to ascertain from the record whether counsel engaged in any dilatory or contumacious conduct, whether, as required by *Tolbert, supra*, a warning had been given, or, whether, as required by *Industrial, supra*, less drastic alternatives were considered. Nothing in the record supports its dogmatic statements.[20]

For example, the Court of Appeals states, "Resolution of the related receivership proceedings continues to face

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[19]The names of the 116 cases and their numbers together with the breakdown were listed in notes 8, 9, 10 and 11 to our Opening Brief in the Court of Appeals. Defendant/Appellee, the FDIC, never questioned or disputed these facts. For brevity, the listing is not here repeated.

[20]As previously noted, there were Findings of Fact and Conclusions of Law by the District Court (App. F, *infra*, A15-A19). But these were prepared in their entirety (right down to the title) by counsel for the FDIC *after* remand of the Court of Appeals (App. E, *infra*, A13-A14), and without any opportunity to comment. There is no support in the record for any of the disparaging findings.

impediments resulting from this litigation." App. G, *infra*, A21. Since no affidavits were filed and no live testimony was given even hinting at actual prejudice, there is no support in the record for this statement. Petitioner's Statement Of The Case, *supra*, sets out the entire record, and demonstrates the reasonableness of Mr. Fisch's conduct. No impediment was offered at all to the Receiver's (FDIC) moving the case, and there is no record of any oral or letter request or motion by the FDIC to move the case, or complaint about any impediment of any receivership proceeding.

Further believing any prejudice are the sales, despite Mrs. Smith's liens, of the Westgate Plaza Hotel in July, 1974 (App. D, *infra*, A9, item No. 15) and the Executive Hotel and Cuyamaca Club property on July 13, 1976 (App. D, *infra*, A10, item No. 33.)

Next, the Court of Appeals states, "The findings of the district court regarding Smilth's 'dilatory and uncooperative conduct' are amply supported by the record." App. G, *infra*, A21. The court makes no reference to any part of the record. Consequently, it is impossible to ascertain what act or failure by Mr. Fisch or present counsel was fairly characterized in the court's mind as dilatory or uncooperative. The record shows a request by Mr. Fisch for a court order to allow mutual discovery, which was granted; a request for one continuance to respond to discovery, which was also granted; and completion of response by June, 1975. How can that be said to be sufficiently dilatory to justify *sua sponte* dismissal.

The Court of Appeals states, "We also conclude that, under the circumstances, no reasonable alternative to dismissal was available. The district court's finding of continuing prejudice to the defendants was supported by the record and demanded decisive action by the court." App. G, *infra*, A21.

As for the so-called "continuing prejudice" we shall not reiterate. However, the only possible prejudice to the FDIC was the obligation to face the case on the merits—certainly no basis for a claim of legal prejudice. What decisive action was needed? The liened property had been sold when the cases were dismissed. The only thing remaining to be decided was the merits of Mrs. Smith's claims. These were patiently awaiting the time when the courts and the Trustees of WCC would be ready to proceed. Petitioner could not control that turn of events.

The "no reasonable alternative to dismissal" conclusion is not supported by the record and cannot withstand fair and logical analysis. Assuming, *arguendo*, the requisite dilatory conduct by counsel, it is simply inconceivable why several alternatives would not have been appropriately available. For example:

**Inquiring If the Matter Should Be Set For Pretrial.**

It is doubtful that the FDIC would have wanted the matter tried without the presence of WCC, its accountants and counsel, and ahead of the bankruptcy proceeding. It is certain that whatever arrangements had been negotiated to make possible the respective sales of the liened properties were still in existence on January 3, 1977. The interest of WCC in part of the liened property went to California Little America in July 1974 (App. D, *infra*, A9, item 15) and to the FDIC in the remaining liened property in July 1976 (App. D, *infra*, A10, item 33). It is likely that a bond, escrowed funds, or other agreements existed among WCC, FDIC, and the purchasers which protected the purchasers' title and allocated among the defendants the risk of loss inherent in Petitioner's claims.

**Setting the Case for Pretrial and/or Trial Within 30-60 Days.**

Preparations by Mrs. Smith would have been minor. Obviously the FDIC was content to receive this dismissal windfall, but below it was primarily interested in requiring WCC to defend against Mrs. Smith's claims. As noted, counsel for Mrs. Smith indicated their readiness to proceed at the court's "pleasure." RT, Jan. 3, 1977, 5-6. Obviously, the FDIC did not request an immediate trial or any trial at all.

**Inquiring of Counsel for FDIC (There Had Been No Rule 41(b) Motion, No Affidavits, No Claims or Assertions of Prejudice) If There Were Any "Receivership Proceedings" Which Were Being Impeded.**

If any impediments existed various relief could have been explored. Release of escrow funds, posting bonds, interest offsets, attorney fees or other conditions could have been imposed to ameliorate any hardships. The statement (App. G, *infra*, A21), "Resolution of the related receivership proceedings continues to face impediments resulting from this litigation," is totally unsupported by the record. What single impediment is there? The FDIC articulated none.

**Placing Off Calendar Until Ripe for Resolution**

This was and is the most logical alternative because Mrs. Smith was never free to pursue any of the three actions in any forum outside the Reorganization Court.

The foundation of the restraining orders, contempt proceedings, and refusal to lift the stay in action No. 74-267 is the power of the Reorganization Court to maintain the *status quo* of the debtor, and to even compel the secured creditor to surrender his security. 6 *Collier on Bankruptcy*, para. 3.32 at 658-61 (Fourteenth Edition 1978). A necessary element of the Reorganization Court's effectiveness is the

rule that legal and factual questions pertaining to the rights of creditors, secured or unsecured, should be determined in and by the Reorganization Court and not in some other forum. Thus, a "reorganization court can and should enjoin the prosecution of any suit which would take from it the decision of any question which it has the duty to decide in connection with the reorganization." *First National Bank in Houston v. Lake*, 199 F.2d 524, 28 (4th Cir. 1952), *cert. denied*, 344 U.S. 914 (1952).

The principal contracting party with Mrs. Smith was WCC. Further, the materials and services furnished are all the basis of claims by Mrs. Smith in the WCC reorganization (CT 211-13, 254). Thus, fundamental questions that will have to be decided in the Reorganization Court are whether Mrs. Smith's contract with WCC is valid,[21] and whether Mrs. Smith's lien is valid[22] in order to determine whether she is a proper claimant at all, and if so, whether she is secured or unsecured. These are issues the Reorganization Court will have to resolve regardless of who has title to the property in question, and regardless of whether there are third parties (such as FDIC) who are interested in a determination of that issue. Consequently, the Reorganization Court is the only forum where these questions should be resolved. The following cases are illustrative. *In re Burton Coal Co.*, 126 F.2d 447 (7th Cir. 1942), cited approvingly, in *In re Equity Funding Corporation of America*, 519 F.2d 1274, 1277 (9th Cir. 1975); *First National Bank in Houston v. Lake*, 199 F.2d 524 (4th Cir. 1952), cited approvingly in *Diners Club v. Bumb*, 421 F.2d 396, 391 (9th Cir. 1970); *In re Long Island Properties*, 40 F.Supp. 611 (S.D. N.Y.

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[21]The third affirmative defense of FDIC herein raises the same issue. CT 27-28.

[22]The second affirmative defense of the FDIC herein raises the same issue. CT 27.

1941). These principles of exclusive bankruptcy court jurisdiction over questions that ought to be decided in the bankruptcy court are succinctly stated in *In re Imperial "400" National, Inc.*, 429 F.2d 671, 677 (3rd Cir. 1970):

> The power of the reorganization court over the "estates of bankrupts and the determination of controversies in relation thereto" exists *though the debtor does not have title to the property in question. In re International Power Securities Cor.*, 170 F.2d at 402. *See also In re Burton Coal Co.*, 126 F.2d 447 (7th Cir. 1942).

*See also, Law Research Service, Inc. v. Crook*, 524 F.2d 301, 315 (2d Cir. 1975); *In re Penn Central Transportation Company*, 446 F.2d 1109, 1112 (3rd Cir. 1971).

In sum, there were economical, logical, and legally compelled alternatives to outright dismissal. How could the Court of Appeals conclude none were available when the trial court didn't explore any — not one.

### E. The District Court Conceded That Two of the Three Lawsuits Could Not Have Been Prosecuted Until a Mere Five Months Prior to Its Dismissal Notice.

Mechanic's liens are creatures of statutory law, and the law of the state where the property is located governs lien enforcement procedures. *In re Romanac*, 245 F.Supp. 882, 884-85 (W.D. Va. 1965); *aff'd, National Bank & Trust Co. v. Allied Supply Co.*, 386 F.2d 225 (4th Cir. 1967); *Colonial Trust Company v. Goggin*, 230 F.2d 634, 637 (9th Cir. 1955).

Under California law the owners at the time of the foreclosure action is commenced (i.e., filed) are indispensable parties. *Packard Bell Electronics Corporation v. Theseus, Inc.*, 244 Cal.App.2d 355, 364 (1966). *Frank Pisano & Associates v. Taggart*, 29 Cal.App.3d 1, 22-23 (1972).

On July 13, 1976, WCC and its subsidiaries transferred their interest in the property subject to Mrs. Smith's lien claim in actions 74-267 and 74-507. Prior to that time, they were the owners and therefore clearly indispensable parties to any foreclosure action,[23] but Mrs. Smith was (and still is) stayed as to prosecuting them. The District Court conceded that as to these lawsuits Mrs. Smith was frozen until July 13, 1976, stating in its Conclusions of Law, No. 4; "Smith's ability to foreclose her mechanic's lien in Action Nos. 74-507-E and 74-267-E was not . . . barred by any restraining orders . . . at any time after July 13, 1976." App. F, *infra* A19; *see also*, App. B, *infra*, A3 at lines 8-12.

Yet *within* six months of that date, on December 13, 1976, it noticed the dismissal hearing under Local Rule 10. That rule, in turn, by its own words applies only to cases in which there has been no activity for *six* months or more! *See* fn. 1, *supra*.

**Conclusion.**

The last time the Court dealt with the factors justifying a trial court's *sua sponte* dismissal for failure to prosecute was in *Link v. Wabash Railroad Company*, 370 U.S. 626 (1962). That was a 4-3 decision of affirmance because "it could reasonably be inferred . . . that petitioner had been deliberately proceeding in a dilatory fashion." *Id.* at 633. It is respectfully submitted that it is time again for the Court to address the question so as to deter the kind of treatment

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[23]Mrs. Smith contends that under applicable California law they were indispensable parties even after transferring their interest to the FDIC, but that contention is not material here.

meted out by the District Court and approved by the Court of Appeals.

The petition for a writ of Certiorari should be granted.

December 12, 1980

Respectfully submitted,

PAUL D. ENGSTRAND,
GEORGE J. BERGER,
*Attorneys for Petitioner,*
*Helen Smith.*

## APPENDIX A.

**Order Dismissing Action for Want of Prosecution:**

United States District Court, Southern District of California.

Helen Smith, dba International Interior Design, Plaintiff, v. Westgate Executive Hotel, et al., Defendants. Civil No. 74-267-E. [Identical Order in Nos. 74-506-E and 74-507-E]

Filed: March 17, 1977.

This action was brought on calendar for a hearing upon the court's own motion for dismissal for want of prosecution under Local Rule 10. Upon duly considering the oral argument of counsel on January 3, 1977, the court does hereby dismiss the action for want of prosecution. In entering this order the court would note that there have been no proceedings in this case for more than 12 months. The court does hereby incorporate its oral comments to counsel in open court on January 3, 1977 as further basis for this order.

DATED: March 17, 1977.

/s/ WILLIAM B. ENRIGHT
William B. Enright, Judge
United States District Court

Copies to:
All parties

## APPENDIX B.

### Memorandum Decision and Order.

United States District Court, Southern District of California.

Helen Smith, et al., Plaintiffs, v. Westgate, et al., Defendants. Civil No. 74-267-E.

Helen Smith, et al., Plaintiffs, v. Westgate, et al., Defendants. Civil No. 74-507-E.

Helen Smith, et al., Plaintiffs, v. Westgate, et al., Defendants. Civil No. 74-506-E.

Filed: May 25, 1977.

Upon duly considering the memoranda and affidavits submitted by counsel, as well as the oral argument held on May 16, 1977, the court finds that plaintiff's motion for relief of judgment pursuant to Fed. R. Civ. P. 60(b) should be denied. The court does hereby reaffirm its ruling of January 3, 1977, dismissing these actions pursuant to Local Rule 10.

These three lawsuits all arise out of Mrs. Smith's alleged furnishing of goods or services to the Westgate-California Corporation and various of its wholly-owned subsidiaries. These lawsuits were filed in San Diego Superior Court in 1974; they were subsequently removed to this court.

The court files in these lawsuits reveal that plaintiff took little action in moving these proceedings to trial. Little or no discovery by plaintiff was forthcoming and the defendant was required to move this court to compel plaintiff's attendance at depositions.

Following the aforementioned failure by plaintiff to prosecute these actions, the court, on its own motion, scheduled a hearing on January 3, 1977 to dismiss these actions pursuant to Local Rule 10. At that hearing, a transcript of which is annexed to this decision, plaintiff was afforded a full

opportunity to discuss the status of the matter and to state to the court why these actions should not be dismissed. In addition, counsel for the F.D.I.C., as receiver of United States National Bank, presented reasons in support of the motion for dismissal.

The court indicated at that time that it concurred with the reasons given by counsel for the F.D.I.C. as to why these actions should be dismissed. These reasons included the lack of advancement toward discovery and trial, the possibility of prosecuting actions 74-267 and 74-507 against the new owners of property subject to the alleged liens as of July 1976; and the substantial detriment incurred by the defendants due to the length of time during which these actions have remained dormant on this court's docket.

Approximately five months after this court entered an order dismissing the above entitled actions, plaintiff moves for relief from entry of judgment pursuant to Fed. R. Civ. P. 60(b). This court has carefully considered the reasons set forth by plaintiff's counsel as to why relief from entry of judgment should be granted. In light of the reasons enunciated at the hearing on January 3, 1977, as well as the fact that plaintiff has raised arguments[1] which properly could have been brought to the court's attention at that time, the court finds that its original order dismissing these actions

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[1]The court has fully considered plaintiff's contention that the owner of property subject to a mechanic's lien at the time of the filing of a foreclosure action is an "indispensable party" for purposes of Fed. R. Civ. P. 19(a). Several cases in California have held to the *contrary*, stating that the sole result of a failure to join the owner is that he is not bound by any subsequent judgment rendered by the court. *Holman v. Toten*, 54 Cal. App. 2d 309, 314-315 (1942); *Holt Mfg. Co. v. Collins*, 154 Cal. 265, 271 (1908; *Robinson v. Muir*, 151 Cal. 118, 121-122 (1907); *Whitney v. Higgins*, 10 Cal. 547, 551 (1858); *contra, Packard Bell, etc. Corp. v. Theseus, Inc.*, 244 Cal.App.2d 355, 364 (1966). Moreover, the court finds that the reasons enunciated at the January 3, 1977 hearing compel a dismissal of these cases for lack of prosecution.

should not be overturned. The exercise of this dismissal power is discretionary in this circuit and the court will presume injury when a delay is unreasonable. *Alexander v. Pacific Maritime Association*, 434 F.2d 281, 283 (9th Cir. 1970); *Pearson v. Dennison*, 353 F.2d 24, 28 (9th Cir. 1965); see also *Link v. Wabash Ry. Co.*, 370 U.S. 626 (1962).

Accordingly, plaintiff's motion for relief from entry of judgment is hereby denied.

DATED: 5/24/77.

/s/ WILLIAM B. ENRIGHT,
William B. Enright, Judge
United States District Court

Copies to:
Plaintiffs
Defendants

## APPENDIX C.

### Order of Submission.

United States Court of Appeals, for the Ninth Circuit.

Helen Smith, d/b/a International Interior Design, Plaintiff/Appellant, vs. Westgate Executive Hotel, et al., Defendants/Appellees. CA Nos. 77-2560, 77-2561, 77-2620, 77-2684, 77-2685, 77-2686; DC Nos. CV 74-267-E, CV 74-506-E, CV 74-507-E; Southern California.

Filed: April 4, 1979.

Before: KENNEDY, ANDERSON, Circuit Judges, and HALL, District Judge.*

Counsel for both parties in these appeals are requested to file within fourteen days, a statement chronogically listing the relevant dates discussed in the oral argument. Any pertinent record references should be included in the statement.

The cause will be deemed submitted upon receipt of the statement.

FOR THE COURT:
EMIL E. MELFI, JR.
Clerk of Court
by: /s/ Elliott R. Sernel,
Elliott R. Sernel,
Deputy Clerk

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*The Honorable PEIRSON M. HALL, Senior United States District Judge for the Central District of California, sitting by designation.

## APPENDIX D.

### Agreed Statement of Chronological Dates.

United States Court of Appeals, for the Ninth Circuit.

Helen Smith, d/b/a/ International Interior Design, Plaintiff/Appellant, vs. Westgate Executive Hotel, et al., Defendants/Appellees. CA Nos. 77-2560, 77-2561, 77-2620, 77-2684, 77-2685, 77-2686; DC Nos. CV 74-267-E, CV 74-506-E, CV 74-507-E; Southern California.

FILED: April 19, 1979.

Pursuant to Order of Submission of April 4, 1979, in the above-captioned matter, the parties hereto, by their respective attorneys of record, submit the following statement chronologically listing dates discussed in oral argument on April 4, 1979. Appellee Federal Deposit Insurance Corporation, as Receiver of United States National Bank, does not, by agreeing to the accuracy of these dates, admit that all such dates are relevant to this appeal.

## ABBREVIATIONS

| | | |
|---|---|---|
| 1) | WCC | = Westgate California Corporation. |
| 2) | FDIC | = Federal Deposit Insurance Corporation. |
| 3) | USNB | = United States National Bank of San Diego. |
| 4) | H.S. | = Helen Smith. |
| 5) | CT | = Clerk's Transcript in United States Court of Appeals for Ninth Circuit. |
| 6) | CT 267 | = Clerk's Transcript from U.S. District Court (So. Cal.) No. 74-267, 9th Cir. Docket No. 77-2560, etc. |
| 6a) | CT 506 | = Clerk's Transcript from U.S. District Court (So. Cal.) No. 74-506, 9th Cir. Docket No. 77-2620, etc. |
| 6b) | CT 507 | = Clerk's Transcript from U.S. District Court (So. Cal.) No. 74-507, 9th Cir. Docket No. 77-2561, etc. |
| 7) | Furn. Lit. | = Furniture Litigation and Lease Litigation having U.S. Court of Appeals (9th Cir.) Docket Nos. 76-2753, 76-2754. |
| 8) | Subord. CT | = Clerk's Transcript in appeal to U.S. Court of Appeals (9th Cir.) Docket No. 78-2603, from subordination of Helen Smith's claims in WCC reorganization (U.S. Dist. Ct., So. Cal., No. 78-0157). |

| ITEM | DATE | EVENT | RECORD REFERENCE |
|---|---|---|---|
| 1. | April 17, 1967 | Service and Purchase Agreement between H.S. (Helen Hill) and WCC | CT 267-14 through 17 |
| 2. | July 12, 1971 | Service and Purchase Agreement between H.S. and WCC subsidiaries and USNB | CT 267-18 |
| 3. | Feb. 13, 1973 | Letter from WCC to H.S. re Storage | Furn. Lit. Ex. KKK (Pet'n For Rehearing, p. 6) |
| 4. | Oct. 18, 1973 | USNB declared insolvent, FDIC becomes Receiver | |
| 5. | Feb. 13, 1974 | Paul Andrew appointed Receiver of Westgate Plaza Hotel (In FDIC foreclosure action) | Furn. Lit. CT 20 |
| 6. | Jan. 31, 1974<br>Feb. 14, 1974 | H.S. files Mechanic's Liens for materials furnished to Westgate Executive Hotel Block | CT 267-19 and 20 |
| 7. | Feb. 26, 1974 | WCC in Chapter X Reorganization w. Blanket Restraining Order | CT 267-236 through 242 |
| 8. | April 26, 1974 | Foreclosure suit commenced on Item 6 liens (Cal. Superior, S.D. County, No. 353346) | CT 267-6 |
| 9. | April 29, 1974 | Lis Pendens recorded re Item 8 above | CT 267-141 |
| 10. | April 29, 1974 | Judge Nielsen orders H.S. to show cause why furniture in Westgate Complex belongs to her. | Furn. Lit. CT 102 |
| 11. | June 10, 1974 | State court action #353346 removed to U.S. Dist. Ct. (So. Cal.) No. 74-267 | CT 267-24 |
| 12. | June 24, 1974 | H.S. files Mechanic's Lien for services to Westgate Plaza Hotel Block | CT 506-17 |
| 13. | June 24, 1974 | H.S. files Mechanic's Lien for services to Westgate Executive Hotel Block | CT 507-18 |

| ITEM | DATE | EVENT | RECORD REFERENCE |
|---|---|---|---|
| 14. | June 24, 1974<br>June 27, 1974 | H.S. files claims in WCC Chapter X proceedings, U.S. Dist. Ct. (So. Cal.) Nos. 74-413 and 74-414, for same services and furniture/fixtures described in Mechanic's Liens in Items 6, 12 and 13 above. | Subord. CT 3804-05 |
| 15. | July 1, 1974 | Westgate Plaza Hotel sold to California Little America Corp. | Furn. Lit. CT 611 |
| 16. | July 9, 1974 | H.S. restrained from prosecuting action No. 74-267 against certain entities until further order of court | CT 267-291 and 292 |
| 17. | Sept. 20, 1974 | Action filed in Cal. Superior Ct. to foreclose liens for services to Westgate Plaza Hotel Block (S.D. County No. 358264) | CT 506-5 |
| 18. | Sept. 20, 1974 | Action filed in Cal. Superior Ct. to foreclose liens for services to Westgate Executive Hotel Block (S.D. County No. 358266) | CT 507-5 |
| 19. | Sept. 25, 1974 | Lis Pendens recorded re Item 17 above | CT 267-141 |
| 20. | Sept. 25, 1974 | Lis Pendens recorded re Item 18 above | CT 267-141 |
| 21. | Oct. 30, 1974 | State Court No. 358264 removed to Federal Dist. Ct. (So. Cal.) No. 74-506 | CT 506-20 |
| 22. | Oct. 30, 1974 | State Court No. 358266 removed to Federal Dist. Ct. (So. Cal.) No. 74-507 | CT 507-21 |
| 23. | Dec. 10, 1974 | California Little America Co. files suit against H.S. for unlawful detainer of 19th floor apartment of Westgate Plaza Hotel | Furn. Lit. CT 1323 |
| 24. | Apr. 21, 1975 | Trustees of WCC file omnibus lawsuit against H.S. and others | *See* Furn. Lit. CT 637 |
| 25. | May 22, 1975 | H.S.'s attorney held in contempt for prosecuting mechanic's lien foreclosure actions against Westgate entities | CT 267-243 |

| ITEM | DATE | EVENT | RECORD REFERENCE |
|---|---|---|---|
| 26. | Aug. 21, 1975 | H.S. denied permission to reopen U.S. Dist. Ct. No. 74-267 | CT 267-252 through 254 |
| 27. | Mar. 26, 1976 | Notice of Proposed transfer of Westgate interest in Executive Hotel block forwarded to H.S. | CT 175, 178 |
| 28. | Apr. 15, 1976 (Trial held on various dates May - Aug., 1975, Feb. 1976) | Magistrate McCue makes "Recommendation On Findings" ("ROF") in Furn. Lit. | Furn. Lit. CT 604 |
| 29. | May 7, 1976 | Judgment in furniture dispute portion of Furn. Lit. | Furn. Lit. CT 1086 |
| 30. | May 24, 1976 | Substitution of attorney for H.S. in Mechanic's Lien foreclosure actions | CT 267-128 |
| 31. | June 23, 1976 | Judgment in lease dispute portion of Furn. Lit. | Furn. Lit. CT 1468 |
| 32. | July 12, 1976 | Notice of Appeal in Furn. Lit. filed | Furn. Lit. CT 1463 |
| 33. | July 13, 1976 | Westgate interest in Executive Hotel Block foreclosed out by FDIC | CT 162-165 |
| 34. | Nov. 5, 1976 | Trustees of WCC file Summary Judgment Motion to Subordinate H.S.' claims based on Furn. Lit. ROF, Item 28 above | Subord. CT 3328 |
| 35. | Dec. 13, 1976 | U.S. District Court (So. Cal.) Rule 10 Dismissal Notice (no mail notice to H.S.' new attorney) | CT 267-129 |
| 36. | Jan. 3, 1977 | Action Nos. 74-267, 74-506, 74-507 dismissed under Rule 10 (appearance on behalf of H.S. by Jennings, Engstrand & Henrikson per George J. Berger) | CT 267-130 |
| 37. | Mar. 17, 1977 | Dismissal Judgment filed re Item 36 above | CT 267-132 |
| 38. | April 15, 1977 | H.S. Notice of Appeal and Motion for Reconsideration re Item 36 above filed | CT 267-135 |

| ITEM | DATE | EVENT | RECORD REFERENCE |
|---|---|---|---|
| 39. | May 16, 1977 | Hearing re Motion to Reconsider Dismissal | CT 267-226 |
| 40. | May 25, 1977 | Memorandum Denying Motion to Reconsider Dismissal filed | CT 267-226 |
| 41. | June 24, 1977 | Notice of Appeal from Item 40 filed | CT 267-296 |
| 42. | Jan. 13, 1978 | Bankruptcy Court denial of Summary Judgment Motion to Subordinate H.S. claims except claims involved in Furn. Lit. | Subord. CT 3936 |
| 43. | Feb. 7, 1978 | Denial of Trustee's motion to reconsider Item 42 above | Subord. CT 3972 |
| 44. | Feb. 15, 1978 | Notice of Appeal to Judge Enright of Item 43 above | Subord. CT 3973 |
| 45. | May 15, 1978 | Memorandum Decision by Judge Enright reversing Bankruptcy Judge re Item 42 above | Subord. CT 4067 |
| 46. | June 14, 1978 | Notice of Appeal from Judge Enright's subordination ruling. Item 45 above | Subord. CT 4108 |
| 47. | Dec. 4, 1978 | Oral argument re Furn. Lit. appeal in this Court (9th Cir. Nos. 76-2753/54) | |
| 48. | Jan. 22, 1979 | Reply Brief in Subordination Litigation filed in this Court (9th Cir. No. 78-2603) | |
| 49. | Feb. 9, 1979 | Memorandum of this Court in Furn. Lit. | |
| 50. | Feb. 23, 1979 | Petition for Rehearing and Suggestion for Rehearing en Banc in Furn. Lit. filed in this Court | |

| ITEM | DATE | EVENT | RECORD REFERENCE |
|---|---|---|---|
| 51. | April 4, 1979 | Oral argument in above-captioned Mechanic's Liens dismissal actions in this court | |

DATED: April 12, 1979.

JENNINGS, ENGSTRAND & HENRIKSON
A Professional Law Corporation
By /s/ GEORGE J. BERGER
George J. Berger
*Attorneys for Plaintiff/Appellant*

DATED: April 13, 1979.

BRONSON, BRONSON & McKINNON
By /s/ RICHARD A. ARDOIN
Richard A. Ardoin
*Attorneys for Federal Deposit Insurance Corporation, as Receiver of United States National Bank*

## APPENDIX E.

### Order and Remand.

United States Court of Appeals, for the Ninth Circuit.

Helen Smith, dba International Interior Design, Plaintiff/Appellant, vs. Westgate Executive Hotel, et al., Defendants/Appellees. CA Nos. 77-2560, 77-2561, 77-2620, 77-2684, 77-2685, 77-2686; DC Nos. CV 74-267-E, CV 74-506-E, CV 77-507-E; (Southern California).

Filed: Aug. 20, 1979.

Appeal from the United States District Court Southern District of California.

Before: KENNEDY, ANDERSON, Circuit Judges, and HALL, District Judge*

Good cause appearing, therefore:

IT IS HEREBY ORDERED

1. That the order submitting the within matters is hereby vacated;

2. That said matters be and are hereby remanded to the District Court with instructions to hold a hearing and make findings of fact and conclusions of law setting forth the particulars wherein appellant was at fault for failure to prosecute;

3. That upon completion of the hearing below, and the entry of findings, conclusion and judgment, the parties will cause to be transmitted to this Court said findings, conclusions and judgment, together with true copies of all supporting documents, whether in this litigation or related litigation, upon which either party relies;

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*Honorable Peirson M. Hall, Senior United States District Judge for the Central District of California, sitting by designation.

4. That upon receipt thereof, the Clerk of this Court will submit the entire matter to this panel which will decide if supplemental briefing and argument are desirable.

## APPENDIX F.

**Findings of Fact and Conclusions of Law of Defendant Federal Deposit Insurance Corporation, as Receiver of United States National Bank.**

United States District Court, Southern District of California.

Helen Smith, dba International Interior Design, Plaintiff, v. Westgate Executive Hotel, et al., Defendants. Civil Nos. 74-267-E, 74-506-E, 74-507-E.

FILED: Oct. 11, 1979.

The motion of this court to dismiss the above actions pursuant to Local Rule 10 for want of prosecution came on for hearing on January 3, 1977; the court at that time reviewed the file and record herein, heard argument of counsel for plaintiff Helen Smith in opposition to said motion and of counsel for defendant Federal Deposit Insurance Corporation, as Receiver of United States National Bank (hereinafter "Receiver") in support of said motion, and reviewed the record and file therein; the court entered its orders of dismissal for want of prosecution on March 18, 1977; such orders were duly appealed by plaintiff Helen Smith to the Court of Appeals for the Ninth Circuit, and that court, by its order dated August 20, 1979, remanded the proceeding for further findings of Fact and Conclusions of Law. The court therefore makes its further Findings of Fact and Conclusions of Law as follows:

### *FINDINGS OF FACT*

1. The three subject cases are breach of contract and mechanics lien foreclosure actions brought by Mrs. Helen Smith ("Smith"). The three actions are referred to here as Action Nos. 74-506-E, 74-267-E, and 74-507-E, respectively.

2. Action No. 74-506-E was originally filed in the Superior Court for the County of San Diego on September 20, 1974. Prior to that date, effective July 1, 1974, all Westgate[1] interests in the subject property (the former Westgate Plaza Hotel and Broadway Buildings located in downtown San Diego) had been transferred to California Little America Company, a California corporation. Action No. 74-506-E sought to enforce Smith's claim for $296,400 in designer and decorator fees based upon purported 1967 and 1971 contracts executed by Smith on her own behalf and by her husband C. Arnholt Smith on behalf of Westgate.

3. Prior to filing of Action No. 74-506-E, Smith was aware that Westgate had transferred all its interests in the properties subject to that action to a non-Westgate corporation, California Little America Company, having unsuccessfully appealed such transfer to the Court of Appeals for the Ninth Circuit.

4. Action No. 74-267-E was filed in the Superior Court for the County of San Diego on April 26, 1974. The properties subject to Smith's claim in this proceeding were the Westgate Executive Hotel and Annex buildings located in downtown San Diego. Those properties were owned by Westgate subsidiaries at the time such action was filed. The Receiver took title to all such properties on July 13, 1976. Action No. 74-267-E sought to enforce Smith's claim of $222,502.03 for purported materials furnished to such properties.

5. Action No. 74-507-E was filed on September 20, 1974 in the Superior Court for the County of San Diego. The properties affected by this action were identical to those in Action No. 74-267-E. Action No. 74-507-E sought to

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[1]Westgate California Corporation, including all of its subsidiaries.

enforce Smith's claim for $390,000 in designer and decorator fees based upon purpoted 1967 and 1971 contracts executed by Smith on her own behalf, and by her husband C. Arnholt Smith on behalf of Westgate.

6. On June 10, 1974, Action No. 74-267-E was removed to this court by petition of the Receiver. On October 30, 1974, Action Nos. 74-506-E and 74-507-E were removed to this court by petition of the Receiver.

7. The only discovery ever initiated by Smith was one set of seven (7) interrogatories propounded in each of the three actions in June of 1975.

8. In each of the three actions the Receiver filed interrogatories and requests for production of documents. Smith failed to respond to such discovery and an order compelling discovery was required in each instance of such discovery.

9. The Receiver noticed the deposition of Smith in Action No. 74-267-E. Smith failed to respond to such notice and again an order was required to enforce Smith's attendance at such discovery.

10. No proceedings of any kind have taken place in any of the three subject actions since July of 1975.

11. The Receiver has faced substantial impediments to proceeding with these actions based on Smith's dilatory and uncooperative conduct.

12. The file and record herein reflect either a failure by Smith to serve many named defendants or her failure to request any defaults.

13. On July 9, 1975, this court enjoined Smith, in Action No. 74-267-E only, from proceeding against Westgate or its subsidiaries.

14. On May 23, 1975, Smith filed a dismissal without prejudice in all three actions as to defendants Westgate

California Corporation and the Trustee for Westgate California Corporation.

15. On August 21, 1975, the Westgate bankruptcy court ordered that Smith prosecute the claims in Action No. 74-267-E as to Westgate, in the Westgate bankruptcy proceedings.

16. Smith was given notice on March 26, 1976 of the proposed transfer of the Westgate Executive Hotel and Annex properties to the Receiver, which transfer was effected July 13, 1976.

17. No restraining order has been in effect at any time since the filing of these three actions as to any defendant other than Westgate and its subsidiaries.

18. Smith has had a reasonable and ample opportunity to litigate these actions in a substantial manner, which has not been done.

19. Defendants, and particularly the Receiver, have and will continue to be prejudiced by the failure of Smith to prosecute these actions in a timely manner in that the subject liens have attached to the subject properties since 1974. Further prejudice will result from the difficulty and uncertainty of proof from Smith and Westgate personnel and records following such an extended delay in prosecuting these claims.

*CONCLUSIONS OF LAW*

1. The exercise of dismissal power pursuant to Local Rule 10 is discretionary in this circuit.

2. Injury from failure to prosecute will be presumed when delay in such prosecution is unreasonable.

3. Smith's ability to foreclose her mechanics' lien in Action No. 74-506-E was not at any time barred by any restraining order of the bankruptcy court or this court.

4. Smith's ability to foreclose her mechanics' lien in Action Nos. 74-507-E and 74-267-E was not at any time barred by any restraining order of the bankruptcy court or this court at any time at any time after July 13, 1976.

5. Smith could have prosecuted all these actions at any time as to non-Westgate defendants outside the bankruptcy proceedings, but was unreasonably dilatory in doing so.

6. Smith has failed to diligently prosecute Action Nos. 74-506-E, 74-267-E and 74-507-E, as required by Local Rule 10 and each such action is therefore dismissed for lack of prosecution.

DATED: October 11, 1979.

/s/ WILLIAM B. ENRIGHT
WILLIAM B. ENRIGHT, Judge
United States District Court

Copies to:
Plaintiff
Defendants

## APPENDIX G.

### Memorandum.

United States Court of Appeals, for the Ninth Circuit.

Helen Smith, dba International Interior Design, Plaintiff-Appellant, vs. Westgate Executive Hotel, et al., Defendants-Appellees. Nos. 77-2560, 77-2561, 77-2620, 77-2684, 77-2685, 77-2686; DC Civ. Nos. 74-0506-E, 74-0507-E & 74-0267-E.

Filed: July 23, 1980.

On Appeal from the United States District Court for the Southern District of California. The Honorable William B. Enright, Presiding.

Before: KENNEDY, ANDERSON, and FARRIS,* Circuit Judges.

We affirm the judgments of the court below dismissing these suits for failure to prosecute pursuant to F.R.Civ. Pro. 41 (b) and Local Rule 10, and denying Smith's motions for reconsideration in each.

A dismissal under Rule 41(b) is reversed only where it is apparent that the court below has abused its discretion. *E.g., Schmidt v. Herrmann,* 614 F.2D 122 (9th Cir. 1980). On review, we find an abuse of discretion only when the record as a whole leaves us with a " 'definite and firm conviction that the court below committed a clear error of the judgment it reached upon a weighing of the relevant factors. . . .' " *Anderson v. Air West, Inc.,* 542 F.2d 522, 524 (9th Cir. 1976). The factors to be weighed include: (1) the appellant's right to a hearing on its claim, (2) the impairment of appellees' defense presumed from the un-

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*The Honorable Peirson M. Hall, originally a member of this panel, died shortly after a remand to the District Court for additional findings and conclusions. The panel was reconstituted and these consolidated appeals were ordered resubmitted on June 23, 1980.

reasonable delay, (3) the policy in favor of prompt disposition of lawsuits, and (4) the duty of the appellant to proceed with due diligence. *See States Steamship Company v. Philippine Air Lines,* 426 F.2d 803, 805 (9th Cir. 1970).

Factors (3) and (4) weigh heavily in the present case. Resolution of the related receivership proceedings continues to face impediments resulting from this litigation. The findings of the district court regarding Smith's "dilatory and uncooperative conduct" are amply supported by the record. Smith's contention that she has not had an opportunity to litigate her claims because defendant Westgate is an "indispensable party" to mechanics' lien foreclosures under California law is meritless. Under California law, the absence of a party who may have an interest in the subject property does not render judgment against those who are before the court impossible. *See Frank Pisano & Associates v. Taggart,* 29 Cal.App.3d 1, 105 Cal.Rptr. 414 (1972). A close reading of the facts indicates that *Packard Bell Electronics Corp. v. Theseus, Inc.,* 244 Cal.App.2d 355, 53 Cal.Rptr. 300 (1966), does not dictate an opposite result. We also conclude that, under the circumstances, no reasonable alternative to dismissal was available. The district court's finding of continuing prejudice to the defendants was supported by the record and demanded decisive action by the court. We have considered each of the other arguments raised by Smith, and we find them unpersuasive.

Because we find that the court did not abuse its discretion in dismissing these suits for failure to prosecute, we also must affirm the denial of the motions to reconsider.

The judgments are

AFFIRMED.

## APPENDIX H.

### Judgment.

United States District Court, Southern District of California.

Helen Smith, dba International Interior Design, Plaintiff, v. Westgate Executive Hotel, et al., Defendants. Civil No. 74-267-E.

FILED: March 17, 1977.

The motion to dismiss this action pursuant to Local Rule 10 having come before the court for oral argument on January 3, 1977, and all the documents on file having been duly considered,

IT IS HEREBY ADJUDGED for the reasons stated in the Order Dismissing Action for Want of Prosecution that this action is hereby dismissed.

DATED: March 17, 1977.

/s/ WILLIAM B. ENRIGHT
William B. Enright, Judge
United States District Court

Copies to:
All parties

## APPENDIX I.

### Order.

United States Court of Appeals, for the Ninth Circuit.

Helen Smith, dba International Interior Design, Plaintiff-Appellant, v. Westgate Executive Hotel, et al., Defendants-Appellees. Nos. 77-2560, 77-2561, 77-2620, 77-2684, 77-2685, 77-2686.

FILED: Sept. 15, 1980.

Before: KENNEDY, ANDERSON and FARRIS,* Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*The Honorable Peirson M. Hall, originally a member of this panel, died shortly after a remand to the District Court for additional findings and conclusions. The panel was reconstituted to include Judge Farris and these appeals were ordered resubmitted on June 23, 1980.